

Le (Migration) [2023] AATA 3496 (15 September 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Truong Nha Tran Le
REPRESENTATIVE:	Mr Michael Cai
CASE NUMBER:	1833901
HOME AFFAIRS REFERENCE(S):	BCC2018/1374264
MEMBER:	Moira Brophy
DATE:	15 September 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations; and • cl 820.221 of Schedule 2 to the Regulations.

Statement made on 15 September 2023 at 9:30am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship and nature of commitment – young Australian citizen child – additional information, consistent and convincing evidence and supporting statements from family and friends – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65
Migration Regulations 1994 (Cth), Schedule 2, cls 820.211(2)(a), 820.221

CASE

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 14 November 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 23 March 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211 because the delegate was not satisfied that the applicant was in a genuine and continuing relationship with her sponsor.
4. The applicant appeared before the Tribunal on 6 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Khac Lan Chau, who is the applicant's sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

7. Background

8. The applicant, Ms Truong Nha Tran Le is a 28-year-old female currently residing in Sydney. She was previously married to Mr Van Kiem Nguyen in the period from 7 March 2015 to 6 August 2017. Her parents and two brothers live in Vietnam, and she has one sister living in Canada.
9. The sponsor, Mr Khac Lan Chau is a 42-year-old male living in Sydney. He has declared no previous relationships. He arrived in Australia from Vietnam with his mother and siblings on 17 October 1993. He is an Australian citizen. His parents, one brother and two sisters are residing in Australia.
10. At the time of application, the parties stated they met on 19 September 2015 at Cabramatta. They commenced dating and they committed to a shared life to the exclusion of all others on 24 December 2015. They were married in Australia on 28 January 2018.

Tribunal proceedings

11. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the applicant and sponsor at the hearing.
12. The parties gave coherent oral evidence about the circumstances in which they met, the development of their relationship and their current living arrangements.

13. The Tribunal accepts the parties' oral evidence that they met in person on 19 September 2015. They committed to a relationship with each other to the exclusion of all others on 24 December 2015. They were married on 28 January 2018 in Australia. They lodged this application on 23 March 2018. Their first child, Chantelle, was born at Bankstown Hospital on [Date].

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether the visa applicant and the sponsor were in a genuine and continuing relationship at the time of application and continue to be in a genuine and continuing relationship at the time of this decision.

Whether the parties are in a spouse or de facto relationship

15. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the applicant claims to be the spouse of the sponsor who is an Australian citizen.
16. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 28 January 2018 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

18. Financial

19. The Tribunal considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; the extent of pooling of financial resources; any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
20. The parties reside together in a home that was purchased by the sponsor in 2018. He purchased the house for \$785,000. He has a mortgage in his name with NAB for \$700,000 and the mortgage repayments are currently \$4,141 per calendar month. These repayments are direct debited from their joint account. Prior to purchasing this house, they lived with the sponsor's parents in a home owned in his name, but which was in reality an asset shared

with his parents and siblings. When that house was sold, the funds were divided among the family members and the sponsor used his allotted share of \$200,000 to purchase their current home including paying the stamp duty and carrying out some renovations prior to their moving in.

21. The sponsor is in full time employment with a tiling company. He works five to six days per week and is paid around \$1800 net per week depending on the number of hours worked. His pay is electronically transferred into their joint account. The applicant works three days a week in administration for the tile company at which the sponsor is employed. Her working hours are flexible and she is paid \$467 net per week into their joint account.
22. The sponsor is in receipt of family tax benefits payments from Centrelink, and these are paid into their joint account.
23. A perusal of the bank statements provided is indicative of their meeting day-to-day expenses from their joint accounts.
24. They presently do not have any joint real estate as the house is in the name of the sponsor only. The parties gave consistent evidence that this was due to stamp duty and other penalty charges because of the applicant not having permanent residency. They presently do not have any savings. They do not have any joint liabilities.
25. Overall, the Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship both at the time of application and at the time of decision.

26. *Nature of the household*

27. In considering the nature of the household, the Tribunal has considered the evidence including any joint responsibility for care and support of children; the parties' living arrangements; and any sharing of housework.
28. The Tribunal accepts the parties have generally lived together on a continuing basis since 2015. The Tribunal accepts the sponsor was absent for a period of some 20 months but that during this period, the applicant continued to live with the sponsor's family in the home owned by the sponsor.
29. The parties provided consistent and convincing evidence regarding the arrangements for their household. The applicant is responsible for the majority of the household chores, the cooking, and the washing. The sponsor tends to the gardens. The applicant does the grocery shopping and sometimes they go together at weekends.
30. They have a young daughter, and the applicant tends to the majority of her caring needs.
31. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.
32. The Tribunal finds the nature of the household is consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

33. *Social aspects of the relationship*

34. In considering the social aspects of the relationship, the Tribunal has considered whether the parties represent themselves to other people as being married to each other; the opinion of

friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

35. At the time of application, the parties provided a number of statutory declarations from family and friends which attested to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
36. The parties provided documentary evidence to support their oral evidence at the hearing that they have enjoyed trips together and with members of the sponsor's family to places such as Port Macquarie, Nelson Bay, Jervis Bay and Lake Conjola.
37. On the basis of the oral evidence of the parties and the evidence provided by way of photographs, the Tribunal finds that the relationship between the applicant and her sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends, and the wider community.
38. The Tribunal finds the social aspects of the relationship are consistent with their being in a genuine spousal relationship at the time of application and at the time of decision.

39. *Nature of the persons' commitment to each other*

40. In considering the nature of the persons' commitment to each other, the Tribunal considered the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
41. The Tribunal finds that the visa applicant and her sponsor have been in a committed relationship since they met in 2015. They have lived together continuously since the end of 2015 except for the period when the sponsor was incarcerated. The Tribunal was mindful the applicant was not divorced from her first husband until August 2017.
42. The parties were familiar with the details of each other's families and with each other's daily work schedules.
43. The Tribunal was mindful there was a young child who was an Australian citizen. Her interests and needs are best served by her parents being together in Australia.
44. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future was consistent. The Tribunal is satisfied that the applicant and her sponsor are committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuing relationship.

CONCLUSION

45. The Tribunal has had the benefit of receiving oral evidence in person from the parties, as well as seeing the parties interact with each other. It has also received a considerable amount of additional information that was not before the delegate. The Tribunal accepts the parties were inexperienced and that led to them not understanding the type of documentation required by the original decision maker.
46. Given these findings, the Tribunal is satisfied that at the time of application, the parties were in a genuine and continuing relationship, and at the time of this decision, the parties are

validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.

47. Accordingly, the Tribunal finds that the applicant satisfies the definition of 'spouse' in s 5F(2) (a)-(d) and the parties are in a spousal relationship.
48. As the requirements of cl 820.211(2) are met, the Tribunal finds that cl 820.211 is satisfied.
49. The Tribunal further finds that at the time of the Tribunal's decision, the applicant continues to be the spouse of the sponsor and continues to meet the requirements in cl 820.211(2), thus satisfying cl 820.221(1).
50. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

51. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211 of Schedule 2 to the Regulations; and
 - cl 820.221 of Schedule 2 to the Regulations.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).